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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 DWIGHT JEFFRIES,

12 Plaintiff,

13 vs.

14 ROBERT M. GATES, Secretary of
Defense, Department of Defense,

15 Defendant.

CASE NO. 09cv568-WQH-RBB

ORDER

16 HAYES, Judge:

17 The matter before the Court is the “Motion for Summary Judgment Or, in the
18 Alternative, for Partial Summary Judgment” (“Motion for Summary Judgment”), filed by
19 Defendant Robert M. Gates. (Doc. # 15).

20 **I. Background**

21 On March 20, 2009, Plaintiff Dwight Jeffries initiated this action by filing a Complaint
22 in this Court. (Doc. # 1). Plaintiff, an African-American who is employed by the Department
23 of Defense Commissary Agency (“DeCA”), alleges that his demotion and related incidents
24 were racial discrimination, and his pay reduction was retaliation for filing a complaint with the
25 Equal Employment Opportunity Commission (“EEOC” or “EEO”). The Complaint contains
26 three counts: (1) “disparate treatment based upon race” in violation of Title VII of the Civil
27 Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e-16; (2) “retaliation for filing EEOC
28 complaint” in violation of Title VII; and (3) “unlawful employment action” in violation of the
Civil Service Reform Act of 1978 (“CSRA”), 5 U.S.C. § 1101. (*Id.* at 2, 9, 10).

1 On April 29, 2010, Defendant filed the Motion for Summary Judgment. (Doc. # 15).
2 Defendant seeks summary judgment as to each of Plaintiff's claims.

3 On June 21, 2010, Plaintiff filed an opposition to the Motion for Summary Judgment.
4 (Doc. # 17). Plaintiff also filed objections and requests to strike paragraph 2 of the declaration
5 of Ernani Pacoma, paragraph 17 of the declaration of William Vick, and Defendant's exhibits
6 12, 13, 14, 19, 32, 37, 39, 42, 43 and 44. (Doc. # 17-2, 18).

7 On July 2, 2010, Defendant filed a reply in support of the Motion for Summary
8 Judgment and four supplemental exhibits. (Doc. # 19).

9 On July 21, 2010, Plaintiff filed four supplemental exhibits in opposition to the Motion
10 for Summary Judgment. (Doc. # 22).

11 On July 25, 2010, Defendant filed a reply brief addressing Plaintiff's four supplemental
12 exhibits. (Doc. # 24).

13 On July 26, 2010, the Court conducted oral argument on the pending motions. (Doc.
14 # 25).

15 **II. Facts**

16 Plaintiff has been employed by the DeCA for over thirty years, including twelve years
17 as the Meat Department Manager at the San Diego Naval Base Commissary ("San Diego
18 Commissary" or "Commissary"). (Compl. ¶¶ 4, 8, Doc. # 1).

19 **A. "Accountability"**

20 Because commissaries exist not to make a profit, but to sell groceries to service
21 members and their families at low prices, commissaries are subject to tight gain/loss tolerances.
22 According to DeCA directives, a meat department's gains or losses for any month may not
23 exceed 2% of product cost, and "[c]umulative meat account tolerance shall not exceed three-
24 tenths of 1 percent gain with no loss to be considered in compliance." (Def. Ex. 6 at
25 NOL_181, Doc. 15-4; Def. Ex. 27 at NOL_267-268, Doc. # 15-4; Vick Decl. ¶ 10, Doc. # 15-
26 2; Jeffries Dep. at 34, 238, Def. Ex. 3, Doc. # 15-3). "A Meat Department Manager is
27 responsible for all operations of the Meat Department," but "[h]is primary responsibility is to
28 ensure that his department operates within accountable tolerance at all times, which is known

1 as 'accountability.'" (Vick Decl. ¶ 10, Doc. # 15-2).

2 **B. Plaintiff's History as Meat Department Manager**

3 In 1996, Plaintiff was promoted to Meat Department Manager at the San Diego
4 Commissary, the position he held until his demotion became effective on May 12, 2008.
5 (Jeffries Dep. at 14, Def. Ex. 3, Doc. # 15-3; Def. Ex. 49, Doc. #15-5). In 1999, Plaintiff was
6 promoted to GS-10, "which made him one of only a handful of meat department managers in
7 the entire 250-plus commissaries world-wide to hold that pay grade." (Vick Decl. ¶ 13, Doc.
8 # 15-2; Jeffries Dep. at 22, Def. Ex. 3, Doc. # 15-3).

9 During Plaintiff's years as Meat Department Manager, his direct supervisor was Ernani
10 Pacoma, the Perishables Manager. (Jeffries Dep. at 18-19, Def. Ex. 3, Doc. # 15-3).
11 Beginning several years before Plaintiff's demotion, his second level supervisor was Rubin
12 Barcelona, the Commissary's Administrator. (*Id.* at 19). In January 2008, William Vick
13 became the Commissary's Director, and Plaintiff's third level supervisor. (Vick Decl. ¶ 1,
14 Doc. # 15-2). Pacoma and Barcelona are Filipino American, and Vick is Caucasian. Plaintiff
15 alleges that these are the individuals who discriminated against him. (Def. Ex. 2 at NOL_19,
16 Doc. # 15-3).

17 In November 2003, a "plan of action to correct Meat Department inventory
18 discrepancy" was drafted and distributed to Plaintiff. (Def. Ex. 13 at NOL_204, Doc. # 15-4).
19 In December 2003, Plaintiff was counseled by Pacoma for being "out of tolerance on monthly
20 inventory." (Def. Ex. 14 at NOL_206, Doc. # 15-4; Jeffries Dep. at 66-67, Def. Ex. 3, Doc.
21 # 15-3).

22 On June 30, 2005, Pacoma completed Plaintiff's yearly performance review and rated
23 Plaintiff "[o]utstanding: Employee exceeds all of the elements of the performance plan." (Pl.
24 Ex. 2 at 7, Doc. # 17-3). Pacoma stated: "Due to Mr. Jeffries['] untiring effort of monitoring
25 meat accountability, Meat department's April 15, 2005 annual inventory resulted in no loss and
26 within DeCA's tolerance level." (*Id.* at 6).

27 In April 2006, Plaintiff was counseled by Pacoma because the "meat department
28 monthly inventory for the month of January, February and March have revealed that your

1 department ha[s] had a loss of \$7,054.78, \$7,037.76 and \$7,024.20 respectively for the year
2 [i.e., 2006]. As per DeCA [Directive] 40-3, ‘a cumulative gain of .3 of one percent, no loss,
3 is allowed based on the total sales since the last accountability inventory.’” (Def. Ex. 19 at
4 NOL_225, Doc. # 15-4; Jeffries Dep. at 115, Def. Ex. 3, Doc. # 15-3). In April 2006, Pacoma
5 gave Plaintiff a list of six “steps [that] will be taken to improve performance.” (Def. Ex. 19
6 at NOL_226, Doc. # 15-4). On June 30, 2006, Pacoma completed Plaintiff’s yearly
7 performance review and rated Plaintiff “[o]utstanding: Employee exceeds all of the elements
8 of the performance plan.” (Pl. Ex. 3 at 11, Doc. # 17-3). Pacoma stated: “Mr. Jeffries’ active
9 involvement in the daily operation of the meat department has contributed greatly to a
10 successful April 15, 2006 annual inventory gain of .03% which is within the DeCA’s tolerance
11 level.” (*Id.* at 10).

12 Beginning in August 2006, Meat Department was out of either monthly or cumulative
13 tolerance every month until Defendant decided to demote Plaintiff on April 29, 2008. (Def.
14 Ex. 21, Doc. # 15-4; Def. Ex. 22, Doc. # 15-3; Def. Ex. 48, Doc. # 15-5; Ruiz Decl. ¶¶ 2-3,
15 Doc. # 15-2). Beginning in December 2006, the Meat Department had a cumulative loss every
16 month until April 2008. (Def. Ex. 22, Doc. # 15-3).

17 In April 2007, the San Diego Commissary moved to a new building. (Jeffries Dep. at
18 223-24, Def. Ex. 3, Doc. # 15-3). “As the largest, most modern and most advanced
19 commissary in the world, the San Diego Commissary is considered DeCA’s crowning
20 achievement.” (Vick Decl. ¶ 14, Doc. # 15-2; *see also* Jeffries Dep. at 223-24, Def. Ex. 3,
21 Doc. # 15-3). According to Vick, “[e]xpectations for this commissary are very high.” (Vick
22 Decl. ¶ 14, Doc. # 15-2). Jeffries testified that he had never “experienced as much scrutiny as
23 [he] did at the new [commissary].” (Jeffries Dep. at 223-24, Def. Ex. 3, Doc. # 15-3).

24 A “new computer system” was implemented at the same time the commissary moved
25 to the new building. (Pacoma Dep. at 84, Pl. Ex. 41, Doc. # 17-5). Pacoma received eight
26 hours of training regarding the operation of the new computer system, but Plaintiff received
27 no training. (*Id.* at 85-86; Jeffries Dep. at 103-04, Pl. Ex. 7, Doc. # 17-3). This computer
28 system “was deployed throughout the Commissaries worldwide in 2007.” (Vick Decl., Pl. Ex.

1 15 at 63, Doc. # 17-3).

2 In May 2007, Barcelona, the commissary's Administrator, reported in an email to the
3 commissary's then-Director, Oriel Rice, that the meat and produce departments "have big
4 shortages for the end of April." (Def. Ex. 28 at NOL_271). The Produce Manager responded
5 that he did "not have control [of food orders in] my department during the grand opening."
6 (*Id.* at NOL_270). Rice reported this to his boss, Zone 16 Manager Sandy Horan, adding that
7 the meat department probably had sustained a loss too. *Id.* Michelle Frost, the Zone's Chief
8 of Business Operations, responded that the meat department "was in the hole for at least two
9 months prior to the grand opening." *Id.* Rice then sent an e-mail to Plaintiff, Frost, Horan,
10 Pacoma and Barcelona which stated: "Jeff, you stated that you were in the hole prior to grand
11 opening because of the frozen fish promo and the paper work needed to be corrected! Did you
12 get it corrected and what was your final figures! Ms. Frost is right; you should have been in
13 tolerance prior to the grand opening! Tell me what you did to correct it." *Id.*

14 On June 28, 2007, Plaintiff sent an email to Pacoma which stated:

15 One of the reasons for the inventory shortage was the numerous damages and
16 surveys we incurred due to the overstock of merchandise leading to and during
17 the grand opening not to mention samples or demos that we did not get a credit
18 and/or pilferage. Also, a [Government Property Lost or Damaged Survey
19 Certificate] for the amount of \$9,896.56 has been submitted ... and is pending
20 approval.

21 (Def. Ex. 29 at NOL_273, Doc. # 15-4; *see also* Barcelona Dep. at 113, Pl. Ex. 50, Doc. # 17-5
22 ("new items that were ordered by upper management for the grand opening" created "a lot of
23 salvage," and "when you throw [food] away, that impacts inventory tolerance")). Plaintiff's
24 email then stated a nine-part "plan of action to correct the meat department discrepancy."
25 (Def. Ex. 29 at NOL_273, Doc. # 15-4). Pacoma forwarded Plaintiff's email to Rice,
26 Barcelona and another individual with the message, "[i]nformation submitted as requested."
27 *Id.* The Government Property Lost or Damaged Survey Certificate which was referenced in
28 Plaintiff's June 28, 2007 email states: "On April 18, 2007 at 2:00 P.M. all meat items were
marked down 50% on fresh meat in the front display case and beef & pork in the holding box.
Received instruction these meat items were not to be transferred over to the new commissary
store." (Pl. Ex. 5 at 17, Doc. # 17-3; *see also* Jeffries Dep. at 154, Pl. Ex. 6, Doc. # 17-3

1 (“[T]he commissary didn’t have control of its orders until April 21st, 2007.”)). Plaintiff
 2 testified that he did not “change anything” as a result of his “plan of action,” except that he
 3 “[l]ooked at the [daily] sales [report] a little bit more.” (Jeffries Dep. at 164, Def. Ex. 3, Doc.
 4 # 15-3).

5 On July 30, 2007, Pacoma completed Plaintiff’s yearly performance review and rated
 6 Plaintiff “[e]xcellent: Employee exceeds more than one-half of the critical elements and meets
 7 all other elements.” (Pl. Ex. 4 at 15, Doc. # 17-3). Pacoma found that Plaintiff “[m]et” the
 8 performance element, “ensure record of operation within established inventory tolerance,” and
 9 Plaintiff “[e]xceeded” all other performance elements. (*Id.* at 14).

10 On August 20, 2007, the commissary did its annual inventory. (Jeffries Dep. at 207,
 11 Def. Ex. 3, Doc. # 15-3). As part of the inventory process, “the tolerance accounts were zeroed
 12 out and departments started anew for purposes of cumulative tolerances.” (Pacoma Decl. ¶ 9,
 13 Doc. # 15-2). After the tolerance account for the meat department was “zeroed out,” the Meat
 14 Department lost \$11,113.45, or -7.0058%, for the last ten days of August. (Def. Ex. 21 at
 15 NOL_245-246, Doc. # 15-4).

16 During September 2007, a Commissary supply technician sent an e-mail to Rice which
 17 stated:

18 After reviewing [Plaintiff]’s receiving procedures, I discovered that they are not
 19 following DeCA rules on receiving, they are completing to delivery ticket after
 20 the driver is already departed and then completing the paperwork by cop[y]ing
 21 the invoice from the company instead of verifying what was delivered[.] [T]he
 final invoice is not signed by the meat department or the driver, so this would
 lead me to believe that the weights of the boxes may not be correct weights that
 are on the invoice.

22 (Def. Ex. 32 at NOL_290, Doc. # 15-5). Rice forwarded this e-mail to Pacoma and Barcelona,
 23 stating: “[Pacoma], please investigate this in more detail and get the meat department to follow
 24 the proper receiving procedures ASAP! This explains why the meat department is always out
 25 of tolerance! This must be corrected immediately!” *Id.* Pacoma replied that he had discussed
 26 the matter with Plaintiff and “instructed him to follow the proper procedure.” *Id.* Rice replied
 27 to Pacoma: “Ernie, you MUST ensure he is following procedures DAILY! He is in violation
 28 of DECA receiving directives and is putting our store in a situation which will require all of

1 us to face disciplinary action!” *Id.*

2 In October 2007, “[i]n an effort to assist [Plaintiff] in [his] department,” Pacoma
3 “assigned [Plaintiff] an additional employee on a temporary basis to assist [Plaintiff] in timely
4 processing of [Plaintiff’s] Meat Department receipts, updating [Plaintiff’s] desktop ledger and
5 performing price checks as necessary.” (Jeffries Dep. at 256, Def. Ex. 4, Doc. # 15-3).

6 In November 2007, after Horan was replaced as Zone 16 Manager by Dave Woody,
7 Woody sent an e-mail to Rice, Pacoma, Barcelona, and others which stated:

8 San Diego Management team

9 Take a look at the loss in your meat and produce departments for October. I
10 want an explanation ... tomorrow ... on why these departments are out of
11 tolerance. I don’t want excuses I want to know why and how did we get to this
12 point. Folks this is unacceptable and I want action taken. If you cannot get
these in tolerance then we will be pulling weekly inventories and disciplinary
action could be taken. If this is a true figure I am very disappointed. There is
no excuse for this.

13 (Def. Ex. 33 at NOL_294, Doc. # 15-5). Barcelona replied:

14 The grand opening fiasco still lingers in our operations, specifically for meat and
15 produce departments’ accountability posture. I am not making this as an excuse
16 but I want to point out that part of this problem is where it started. Also, we
17 have submitted two [Government Property Lost or Damaged Survey
18 Certificate]’s ... to the region ... for the items that we lost on April 18, 2007 for
reducing the prices of all meat and produce items due to closure of the old store
in preparation for the move to the new store. We still have not gotten approval
for these [Government Property Lost or Damaged Survey Certificate]’s.
Although these amounts will not cover the departments’ shortages, once
approved, they will surely help in assessing these ongoing issues.

19 *Id.* at NOL_293-294. Barcelona proposed three “corrective actions” both departments would
20 take to fix the problem. *Id.* at NOL_294. Woody replied:

21 I am still not very happy. There were losses during the grand opening but I
22 know there are more underlying problems. Your meat manager should be
23 checking the front end reports to ensure that all meat items are being rung up
under the proper departments. It would not hurt him to go up front and monitor
24 the front end to watch the cashiers and make sure they were ringing items in the
right department. If I was meat manager or ... produce manager and my account
25 was this far out of tolerance then I would take it upon myself to conduct more
inventories not waiting until the zone manager or deputy store manager told
26 them to. There is defi[nite]ly a trend going on here. The losses are growing and
if the excuse is that the grand opening was the cause then common sense would
27 tell me that these should not be growing but it seems like both the meat manager
and the produce manager are not concerned and think that their problems are
28 related to the grand opening.

In November if these inventories do not improve then both the [m]eat manager

1 and the produce manager will be put on Performance Improvement Plan.

2 *Id.* at NOL_293. Rice replied:

3 You are 100% right! I have told [Plaintiff] since last August to conduct
4 inventories b[i] weekly or weekly if necessary! There is no excuse to continue
5 with the losses without performing a weekly inventory! He must get a hand[le]
6 on this problem!

7 I know we had problems with the grand opening but we need to move forward
8 in addressing this issue. Weekly inventories need to be conducted before he
9 [loses] his job!

10 Mr. Pacoma, please implement a weekly inventory ... NOW! If you need help
11 [Barcelona] and I are here, and if you prefer Mr. Woody is always willing to
12 send meat managers to help [Plaintiff]! This has gone on too long!

13 *Id.*

14 On November 20, 2007, Pacoma sent an e-mail to Plaintiff and the Produce Manager,
15 Numenano Reyes, "inform[ing] [them] that effective today ... you will be conducting weekly
16 inventory until your monthly inventory results fall within the DeCA's tolerance level." (Def.
17 Ex. 34 at NOL_296, Doc. # 15-5).

18 By the end of November 2007, the Produce Department had reduced its cumulative loss
19 from -2.0192% to -.5463%, and the Meat Department had reduced its cumulative loss from
20 -2.7287% to -1.1058%. (Def. Exs. 23 & 24, Doc. # 15-4; Def. Ex. 21 at NOL_248-249, Doc.
21 # 15-4).

22 On December 20, 2007, Pacoma sent Plaintiff a memorandum stating that Plaintiff was
23 being placed on a "Performance Improvement Plan" because Plaintiff's "performance ... is
24 unsatisfactory" in the "critical elements" of "ensur[ing] record of operations remain within
25 established inventory tolerance" and "no more than .3% overage, no loss per month allowed."
26 (Def. Ex. 36 at NOL_313, Doc. # 15-5). Pacoma stated:

27 The Meat Department has not been within the allowable tolerance (.3%
28 gain no loss) for the last four months of the rating ending November 30, 2007.
In an effort to assist you in your department in October 2007 I assigned you an
additional employee on a temporary basis to assist you in timely processing of
your Meat Department receipts, updating your desk top ledger and performing
price checks as necessary. Currently the Meat Department has a loss of
\$17,489.92 at a -1.1058%. As the Meat Manager, when the allowable variance
is exceeded, the Meat Manager should take action to review all operational areas
and investigate possible causes. The review should include, but not be limited
to the following: review of receiving procedures; pricing of products; possibility
of cross-ringing; possibility of employee or patron theft; review of inventory

1 procedures; review of all accountable documents; ... and excessive salvage being
2 generated.

3 As discussed previously, weekly price verification is required to ensure
4 accurate pricing is displayed, also ensuring accurate scanning price. Performing
5 weekly price verification is a critical area to ensure a high level of
6 accountability. ...

7 [Y]ou will be given (60) calendar days during which you will have an
8 opportunity to demonstrate acceptable performance with respect to the above
9 critical element. To be fully successful in this element your monthly tolerance
10 shall not exceed 2 percent plus or minus. I will monitor your performance
11 closely during this period, and at the end of the sixty-day period I will reevaluate
12 your performance and determine whether your performance has reached an
13 acceptable level of competence. If your performance has not reached this level,
14 you will be advised as to whether and when further action will be taken.

15 *Id.* at NOL_313-314. In an affidavit, Pacoma stated:

16 By [the] November 2007 deadline for improvement, the commissary produce
17 manager, Numeriano Reyes, had eliminated almost three quarters of his
18 cumulative loss in October, reducing it from -2.0192% to -.5463%. Mr. Jeffries,
19 who had a -2.7287% loss in October, also improved modestly in November, but
20 still had a loss of -1.1058%, which was nearly twice as large as the produce
21 department's. Given the size of Mr. Jeffries' loss, the duration of his
22 accountability problems, the fact that I had previously counseled him at least
23 twice for such problems, the fact that we had already sent in another meat
24 department manager as well as a clerk to help him fix his problems, and my
25 receipt of an order from Zone Manager Dave Woody to place the department
26 managers on Performance Improvement Plans ('PIP') if they did not show
27 sufficient improvement, on December 20, 2007, I placed Mr. Jeffries on a PIP.
28 ... I placed Mr. Reyes on a PIP in February 2008, following his department's
January loss of -0.4524.

(Pacoma Decl. ¶¶ 10-11, Doc. # 15-2).

During Plaintiff's "PIP period," Pacoma assisted Plaintiff in "trying to get his
accountability issues squared away." (Pacoma Dep. at 224, Pl. Ex. 12, Doc. # 17-3). Pacoma
"also assigned an accounting employee to assist [Plaintiff] during [the PIP] time period." (*Id.*
at 225-26). Pacoma testified that "four or five times" during the PIP period, he discovered "a
problem with accounting of the meat." (*Id.* at 227-28). Specifically, "several times" Plaintiff
and one of his subordinates failed to accurately "count the meat" during inventory. *Id.*
Pacoma "participate[d] in several of [the] inventories" during Plaintiff's PIP period, although
Pacoma "wasn't with [Plaintiff] all of the time." (*Id.* at 229). Pacoma testified that he did not
have an explanation for why Plaintiff was still out of tolerance during the PIP period. (*Id.* at
252).

At the end of December 2007, the Meat Department's monthly gain was 2.982%, or 0.982% out of tolerance, with a cumulative loss of -0.0445%. (Def. Ex. 22 at NOL_256, Doc. # 15-4). In December 2007, three of the ten meat departments in Zone 16 were out of tolerance, although Plaintiff's department was the only one to have also been out of tolerance in November 2007. (Pl. Ex. 49 at 299, Doc. # 17-6; *see also* Def. Ex. 55 at NOL_373, Doc. # 19-1 (same)).

In January 2008, Vick replaced Rice as Director of the San Diego Commissary. (Vick Decl. ¶ 1, Doc. # 15-2). On January 13, 2008, Vick sent Plaintiff an email which stated:

The meat case was a total embarrassment this afternoon. As a matter of fact, this is my fo[u]rth day at SDNB Commissary and your meat department is the worst I have ever seen anywhere in my 20 year career. It is only 1600 and all meat cases are practically empty. You have pork in the back room that needs to be priced and no one is pricing it. There has not been anything to stock all afternoon so I don't have a clue what you[r] staff has been doing all afternoon. I am not going to tolerate this.

(Def. Ex. 37 at NOL_316, Doc. # 15-5).

On January 18, 2008, Pacoma wrote a "mid-year review" for Plaintiff which stated:

- Monthly inventory shall not exceed 2 percent plus or minus and cumulative shall not exceed three-tenths of 1 percent gain with no loss.
- Timely correction and submission of inspection reports.
- Never-out items must be available at all times during business hours.

(Def. Ex. 38 at NOL_318, Doc. # 15-5). On January 19, 2008, Pacoma issued a "letter of concern" which stated:

On January 7, 2008, at approximately 1500 hours during a walk through of the Meat Department by Mr. Vick and Mr. Barcelona it was noted that the department was completely out of ground beef. ... [G]round beef is one of the 'Never-Out' items. In addition, at about 1600 on the same day seven more 'Never-Out' items were out and also pork products.

On January 12, 2008, during my periodic check, the Meat Department was out of two 'Never-Out' and one 'Top 20' items. Again, on January 16, 2008, Mr. Vick and Mr. Barcelona found the meat department was out of fresh ground beef.

Mr. Jeffries I have a concern regarding the above. ... Please bear in mind ..., if the above issues continue, I will have no alternative but to take further administrative action.

(Def. Ex. 39 at NOL_320, Doc. # 15-5).

1 On January 20, 2008, Vick sent an e-mail to Woody which stated:

2 The ... meat department is in pathetic condition. As you are aware the
3 department has run out of ground beef on several occasions in the 2 weeks that
4 I have been here and today at 0730, the case was practically empty after the store
5 opened. When we reviewed the Meat Department Record of Operations last
6 week, it was evident by the tremendous losses and gains occurring monthly that
7 the inventory is inaccurate. The spot inventory that Mr. Jeffries submitted last
8 Thursday indicates that he lost another \$1700 since the first of the month. Mr.
Jeffries simply does not have a handle on the operation or the inventory. Due
to the size and significance of this department to Zone 16 and DeCA West, we
need to take corrective actions ASAP. I'm afraid the issues are so widespread;
it is going to take someone with meat expertise time to straighten things out. I
don't have confidence whatsoever in Mr. Jeffries['] ability to get a grip on
things.

9 (Pl. Ex. 16 at 68, Doc. # 17-3).

10 During January 2008, Dan Adams, a meat department manager from another store, was
11 brought in to assist Plaintiff. (Jeffries Dep. at 288-290, Def. Ex. 4, Doc. # 15-3). In early
12 February 2008, Adams submitted three reports to Vick detailing his "finding[s] in [the] meat
13 dept." (Def. Exs. 42-44, Doc. # 15-5). Adams' findings included: "meat manager research[ed]
14 his ledger and found double entry on receipts a correction of \$27,720.99"; "inventory is still
15 in the negative"; "wrong price[] was found ..."; and "manager special was done wrong." (Def.
16 Ex. 42 at NOL_325-326, Doc. # 15-5). Adams stated that he offered many suggestions to
17 Plaintiff and his staff. (Def. Exs. 42-44, Doc. # 15-5).

18 At the conclusion of January 2008, the Meat Department's monthly loss was -5.6197%,
19 or -3.6197% out of tolerance, with a cumulative loss of -0.9903%. (Def. Ex. 22 at NOL_256,
20 Doc. # 15-4). At the conclusion of February 2008, the Meat Department's monthly loss was
21 -2.6335%, or -0.6335% out of tolerance, with a cumulative loss of -1.2417%. (Def. Ex. 22 at
22 NOL_256, Doc. # 15-4).

23 On March 25, 2008, Pacoma issued a memorandum to Plaintiff, which provided
24 Plaintiff with "notice that I propose to demote you from your position of Supervisory
25 Commissary Management Specialist (Meat Manager), YC 1144 01, at the San Diego Naval
26 Base Commissary, CA, to the position of Meat Cutter, WG-4714, at the Imperial Beach
27 Commissary, CA." (Def. Ex. 46 at NOL_336, Doc. # 15-5). The memorandum "charge[d]"
28 Plaintiff with "failure to follow instructions" and contained five "specifications." (*Id.* at

1 NOL_336-337). The first three specifications stated that the Meat Department was out of
2 tolerance during the period of July 2007 through February 2008. The fourth specification
3 stated that, on February 26, 2008, Plaintiff failed to obey an instruction from the store director
4 “to store meat items in the walk-in cooler after wrapping.” (*Id.* at NOL_337). The fifth
5 specification stated that, on March 4, 2008, Plaintiff failed to obey the “accepted practice for
6 wrapping and packaging meat.” *Id.* The memorandum stated that Plaintiff may submit to
7 Barcelona a response to the proposed action within 21 days. (*Id.* at NOL_338).

8 Plaintiff responded to the proposed demotion from his home e-mail address. (Jeffries
9 Dep. at 342, Def. Ex. 4, Doc. # 15-3). Barcelona testified that he did not recognize Plaintiff’s
10 personal e-mail address, and he deletes any e-mail he receives from an unknown address.
11 (Barcelona Dep. at 241-43, Def. Ex. 53, Doc. # 15-5).

12 On April 29, 2008, Barcelona gave Plaintiff a memorandum stating that Barcelona had
13 decided to demote Plaintiff “from [his] position as Meat Department Manager, GS-1144-10,
14 at San Diego Naval Base, to the position of Meat Cutter WG-7407-07 at the Imperial Beach
15 Commissary for the following charges: Failure to follow directions.” (Def. Ex. 48 at
16 NOL_340, Doc. # 15-5). At the time Barcelona gave this memorandum to Plaintiff, Plaintiff
17 asked Barcelona if he had read Plaintiff’s response to the proposed demotion. (Barcelona Dep.
18 at 241-42, Def. Ex. 53, Doc. # 15-5). Barcelona said he had not, and Plaintiff gave Barcelona
19 a hard copy of his response to the proposed demotion. (*Id.* at 242). Barcelona showed the
20 response to Vick, who told Barcelona, “I’m not honoring that statement.” (*Id.* at 243). On
21 May 2, 2008, Barcelona issued an amended memorandum, wherein Barcelona stated: “I have
22 reviewed [Plaintiff’s] response, and find that the contents do not change the facts or alter the
23 outcome.” (Def. Ex. 49 at NOL_342, Doc. # 15-5). The amended memorandum stated that
24 “May 10, 2008 will be your last day as the Meat Department Manager at the San Diego Naval
25 Base Commissary.” *Id.* Barcelona testified that “the only reason” Plaintiff was demoted “was
26 that the meat department was not within appropriate inventory tolerance.” (Barcelona Dep.
27 at 173, Pl. Ex. 53, Doc. # 17-5). Barcelona testified that Vick was “the ultimate deciding
28 authority” on whether to demote Plaintiff, and Vick told Barcelona, “I need you to issue the

1 letter [demoting Plaintiff].” (Barcelona Dep. at 90, Pl. Ex. 54, Doc. # 17-6). Barcelona
 2 testified that he “d[id]n’t know” whether he wanted to demote Plaintiff, but he was “ordered
 3 to do so, and that’s what [he] did.” (*Id.* at 239).

4 Vick, Pacoma and Barcelona testified that they assumed that someone in human
 5 resources would have considered the *Douglas* factors in finalizing Plaintiff’s demotion and
 6 transfer.¹ (Vick Dep. at 318, Pl. Ex. 25, Doc. # 17-4; Pacoma Dep. at 275, Pl. Ex. 45, Doc. #
 7 17-5; Barcelona Dep. at 251-52, Pl. Ex. 46, Doc. # 17-6). DeCA human resources
 8 representative Jacquelyn Deaser testified that she “consider[s]” and “review[s] the *Douglas*
 9 factors [her]self,” and she “talked about ... the items in the *Douglas* factors” “with [people in]
 10 San Diego with regard to Mr. Jeffries,” but she did not “go over the *Douglas* factors with
 11 them.” (Deaser Dep. at 138, Pl. Ex. 47, Doc. # 17-6).

12 On May 8, 2008, Plaintiff initiated a complaint with the DeCA EEO office, alleging
 13 racial discrimination. (Pl. Ex. 27 at 142, Doc. # 17-4). On May 9, 2008, Vick received an e-
 14 mail from an EEO counselor regarding Plaintiff’s charge of discrimination. (Pl. Ex. 17 at 70,
 15 Doc. # 17-3). Vick forwarded the e-mail to Woody and stated, “This was bound to happen.”
 16 *Id.* Woody replied to Vick, “No worries we knew he would do this.” *Id.*

17 On May 9, 2008, Vick issued a “memorandum of correction,” which stated:

18 The purpose of this memorandum is to provide corrected information in
 19 regards to our accountable inventory conducted on April 30, 2008. ...

20 Transfer sales amount of \$24,591.11 from Grocery Department to Meat
 21 Department. ... Pork Mini Ribs have been scanning to Grocery Department....
 Reduce meat inventory by \$11,845.60. These items were received on May 1,
 2008 (after inventory) and were included in the inventory on April 30, 2008.

22 With the transfer of \$24,591.11 to the Meat Department, our Meat
 23 Department book inventory will read \$75,475.23. With the reduction of
 \$11,845.60 in Meat Department, our modified Meat Physical Inventory will read
 24 \$80,952.63 with a gain of \$5,477.40 (.011%).

25 (Pl. Ex. 1 at 2, Doc. # 17-3). Woody testified that Vick did not inform him about the May 9,
 26 2008 memorandum of correction, nor was he aware of “a glitch in the computer system.”

27 ¹ “In *Douglas [v. Veterans Admin.]*, 5 M.S.P.R. 280, 305-06 (1981) the [Merit Systems
 28 Protection] board articulated twelve factors that may be considered in determining the
 appropriate sanction for a particular offense.” *McClaskey v. U.S. Dep’t of Energy*, 720 F.2d
 583, 587 (9th Cir. 1983).

(Woody Dep. at 119-22, Pl. Ex. 44, Doc. # 17-5). Woody testified that he was not informed that the Meat Department was in cumulative tolerance on the day Plaintiff was demoted or that a “loss ... was suffered when [DeCA] moved from the old store to the new store.” (*Id.* at 146; *see also id.* at 117-18, 121-23, 125). Woody testified that the \$24,591.11 “memorandum of correction” and the fact that the Meat Department was in cumulative tolerance on the day Plaintiff was demoted “should have been taken into consideration” prior to implementing discipline. (*Id.* at 126).

Pacoma testified that “we found that the baby back ribs [were] scanning to grocery” in the amount of \$24,591.11, and he had no knowledge of any other instances of money being credited to the Meat Department from another department. (Pacoma Dep. at 94-95, Def. Ex. 56, Doc. # 19-1; *see also id.* at 75).² Pacoma testified that he “was checking some meat products, ... [he] noticed an item that was mislabeled. Instead of having a meat label, it had a grocery label on it.” (Pacoma Dep. at 74-75, Pl. Ex. 9, Doc. # 17-3). The mislabeled item was “Tyson baby back ribs” and the mislabeling was done by “an outside third party ... vendor stocker.” (Pacoma Dep. at 75, Def. Ex. 56, Doc. # 19-1). Pacoma testified:

The label was grocery versus meat. And you can just eyeball that, because you can see it. It says [‘]grocery[’] on the label. ... And if you see that ... you know for sure that that item will go to that department. And I know that that item is supposed to be meat department, so I know there is a mistake there. ... [T]he issue ... was that the vendor stocker put [on] the wrong label. He did not use the meat label.

(Pacoma Dep. at 233, 236, Def. Ex. 57, Doc. # 19-1).

Barcelona testified that he was not aware of any “glitch” or “problem” with “the computer system at the commissary.” (Barcelona Dep. at 73, Pl. Ex. 42, Doc. #17-5). The clerk assigned to assist Plaintiff, Emelina Daplas, stated that the “computer problem” was that when certain items of meat were scanned at the cash register, the register “would say ‘enter amount’ and that’s it. Then the Cashier would have to enter the price of the meat and the

² Portions of Pacoma’s deposition, Defendant Exhibits 56 and 57, contain handwritten changes. Defendant asserts that “Pacoma corrected” the transcript, and Plaintiff has not disputed this assertion. (Doc. # 19 at 5 n.3).

1 department.” (Pl. Ex. 14 at 58, Doc. # 17-3).³ Vick stated in an affidavit that the computer
 2 system used in the San Diego Commissary “was deployed throughout the Commissaries
 3 worldwide in 2007” and that “other departments” using the same system “were identifying
 4 issues and correcting them so it would not jeopardize their accounts to be out of tolerance on
 5 an ongoing basis.” (Vick Decl., Pl. Ex. 15 at 63, Doc. # 17-3).

6 Plaintiff was demoted effective May 11, 2008. (Def. Ex. 52, Doc. # 15-5). The
 7 paperwork for Plaintiff’s demotion and resulting pay reduction was initiated on May 15, 2008
 8 and completed on June 4, 2008. (Def. Ex. 51, Doc. # 15-5). On May 16, 2008, Vick sent an
 9 e-mail to the “North Island Store Dir[ector]” which stated: “I know you don’t want or need Mr.
 10 Jeffries on your payroll but due to the sensitivity of the situation, we really need to make sure
 11 everything is done timely. Mr. Jeffries will probably file with the EEO or [Merit Systems
 12 Protection Board] and we need to make sure everything is as tight as possible.” (Pl. Ex. 18 at
 13 72, Doc. # 17-3).

14 Plaintiff testified that at the time Barcelona informed Plaintiff that he was being
 15 demoted, Barcelona said, “You don’t have anything to worry about. You should be getting
 16 your same salary.” (Jeffries Dep. at 327-28, Pl. Ex. 30, Doc. # 17-4). Woody testified that,
 17 at the time of Plaintiff’s demotion, Deaser told him that the demotion and “transfer would not
 18 result in a pay cut to Mr. Jeffries.” (Woody Dep. at 130, Pl. Ex. 51, Doc. # 17-6). On June 26,
 19 2008, Vick sent an e-mail to Woody and Deaser indicating that he had received a phone call
 20 from Plaintiff’s wife “inquiring about the reduction in Mr. Jeffries[’] salary.” (Pl. Ex. 28 at
 21 146, Doc. # 17-4). Vick asked if Plaintiff’s “salary was reduced to Meatcutter pay.” *Id.*
 22 Woody responded, “It was my understanding that this reassignment would not result in a loss
 23 of pay. ... [Deaser,] [p]lease help us check into this....” *Id.* Deaser responded: “Mr. Jeffries[’]
 24 salary would have been set to a meat cutter. This was a disciplinary action, so he was not
 25 entitled to retain pay.” (Pl. Ex. 37 at 229, Doc. # 17-5). On August 30, 2008, the Defense
 26 Finance and Accounting Service sent Plaintiff a letter requesting \$782.99 in wage
 27

28 ³ Daplas’ declaration is not signed, but Defendant does not object to it. Accordingly,
 it will be considered by the Court.

1 “overpayment [a]s a result of a Personnel change.” (Pl. Ex. 29 at 148, Doc. # 17-4).

2 After Plaintiff’s demotion, Pacoma acted as interim Meat Manager. (Pacoma Dep. at
3 65, Pl. Ex. 40, Doc. # 17-4). Pacoma testified that “Mr. Epps,” who is African American and
4 had been the “Lead Meat Cutter” at the San Diego Commissary since approximately 1998, did
5 a “good job.” (*Id.* at 49-50, 63-64). Vick stated that the new San Diego Commissary Meat
6 Manager is Caucasian, and was a DeCA Meat Manager at the Bangor, Washington
7 Commissary. (Vick Decl., Pl. Ex. 15 at 65, Doc. # 17-3).

8 Plaintiff stated in an affidavit:

9 Numerous departments in Zone 16 stores have experienced chronic inventory
10 variations. This has been, and continues to be an issue in all stores. ... [I]n my
11 34 years with DeCA, I have never seen or heard of any other manager ever being
disciplined at all for inventory variance.

12 (Jeffries Decl. ¶¶ 3-4, Pl. Ex. 23, Doc. # 17-4). Plaintiff testified that he did not believe that
13 either the San Diego Commissary Produce Manager or the Grocery Manager “was out of
14 tolerance cumulatively to as great a percentage as [Plaintiff] w[as],” but Plaintiff believed the
15 Produce Manager “was out of monthly tolerance to as great a percentage as [Plaintiff] w[as].”
16 (Jeffries Dep. at 399, Def. Ex. 4, Doc. # 15-3).

17 Woody testified that “a lot of stores have inventory variations,” but to his knowledge,
18 the only person who has been “disciplined ... for inventory variation” is Plaintiff. (Woody
19 Dep. at 165-66, Pl. Ex. 22, Doc. # 17-3). Barcelona testified that, in his experience, Plaintiff
20 “was the only management person who [has] ever been demoted because of being out of
21 tolerance.” (Barcelona Dep. at 148, Pl. Ex. 52, Doc. # 17-6). Reyes, the Produce Manager at
22 the San Diego Commissary, stated that “this is the first time I have ever heard of the Manager
23 [being] demoted.” (Reyes Decl., Pl. Ex. 38 at 232, Doc. # 17-5).⁴

24 Vick stated in an affidavit: “Before Mr. Jeffries’ demotion, I had demoted two other
25 department managers for management deficiencies, including accountability problems. Both
26 of those managers were Caucasians.” (Vick Decl. ¶ 15, Doc. # 15-2). Vick testified that in
27

28 ⁴ Reyes’ declaration is not signed, but Defendant does not object to it. Accordingly,
it will be considered by the Court.

late-2008 or early 2009, he hired an African-American employee at the San Diego Commissary for the position of Supervisor Store Associate. (Vick Dep. at 106-07, Def. Ex. 58, Doc. # 19-1). Vick had previously worked with this employee at the Camp Pendleton Commissary, and his new position at the San Diego Commissary constituted a promotion. *Id.*

III. Contentions of the Parties

With respect to Plaintiff's Title VII discrimination claims, Defendant contends: "Plaintiff cannot establish discriminatory animus" or "a prima facie case of discrimination" (Doc. # 15-1 at 14-15); "Plaintiff identifies no similarly situated employee who was treated better" (Doc. # 19 at 2); and Defendant's legitimate nondiscriminatory reason for demoting Plaintiff was that, "despite repeated warnings, chances, and efforts to assist Plaintiff, he was simply not able to successfully perform his duties—and his department had lost money for well over a year" (Doc. # 15-1 at 16-17). Defendant also contends: "Plaintiff failed to timely exhaust his EEO administrative remedies for discrete acts occurring before March 21, 2008," including "the December 2007 PIP (which ended in February 2008) and the January 2008 Letter of Concern" (*id.* at 12); and the "December 2007 PIP, January 2008 Letter of Concern, and March 2008 Proposed Demotion Letter" "are not sufficiently adverse ... [to] support[] an actionable adverse action claim under Title VII" (*id.* at 13). With respect to Plaintiff's Title VII claim that his pay was cut in retaliation for his EEO activity, Defendant contends: "Plaintiff has no evidence that anyone involved in processing his demotion even knew of his EEO activity" (*id.* at 17); "a DeCA employee like Plaintiff who is demoted for performance or disciplinary reasons is not entitled to ... save pay"; and Plaintiff "has no evidence that the reduction had any connection with either his EEO activity or his race" (*id.* at 18). Finally, Defendant contends that "this Court lacks jurisdiction over Plaintiff's CSRA claim" because "Plaintiff has waived his CSRA claim by bypassing the [Merit Systems Protection Board] in favor of the district court." (*Id.* at 19, 25).

Plaintiff contends that he "was wrongfully demoted from his long term managerial position based on pretext, innuendo and in violation of agency policies, procedures and guidelines." (Doc. # 17 at 1). Plaintiff contends that he has offered the following "specific

1 and substantial direct and indirect evidence of racial animus”:

2 (1) Only manager who is African-American, who was disciplined for inventory
3 variation, in zone manager Woody’s 22-year career and in Jeffries[’] 32-year
4 career and in produce manager Reyes’ career; (2) Inventory variation was an
5 illusion known to Vick, who corrected the books one day after Plaintiff’s
6 demotion; (3) Complete and total disregard of DeCA regulations and guidelines
7 in implementing Plaintiff’s discipline; (4) Discipline far exceeds internal DeCA
8 rules; (5) Complete failure to consider *Douglas* factors; (6) Testimony of Kathy
9 Hodges-Shaw that Vick was discriminating; (7) New meat manager is
10 Caucasian; (8) No African American managers at the San Diego Commissary
11 since Plaintiff transferred.

12 (*Id.* at 12 (citations omitted)). With respect to his retaliation claim, Plaintiff contends:

13 The Plaintiff ... has proffered substantial evidence to the effect that a wrongful
14 motive was more likely than not a motivating factor in the action. In this regard,
15 Plaintiff was told, on several occasions, by multiple managers that he would
16 have ‘safe pay,’ despite demotion. ... He did, in fact, receive safe pay through
17 August, 2008 when his pay was retroactively cut. Additionally, DeCA sought
18 reimbursement.

19 (*Id.* at 14). With respect to Defendant’s contention that the Court lacks jurisdiction over
20 Plaintiff’s CSRA claim, Plaintiff contends that, “[a]lthough there is no relevant Ninth Circuit
21 authority, all of the applicable case law in every circuit that has considered the issue
22 unanimously supports the Plaintiff’s position that this Court has jurisdiction over the non-
23 discrimination claims in a ‘mixed case’ complaint”; and “Defendant’s counsel is estopped from
24 arguing a requirement to resort to the [Merit Systems Protection Board] first, contrary to his
25 client’s own longstanding interpretation and written, detailed instruction to Plaintiff and other
26 claimants allowing filing directly with the District Court.” (*Id.* at 15, 23).

27 **IV. Discussion**

28 **A. Standard of Review**

Summary judgment is proper when the “pleadings, depositions, answers to
interrogatories, and admissions on file, together with the affidavits, if any, show that there is
no genuine issue as to any material fact and that the moving party is entitled to judgment as
a matter of law.” Fed. R. Civ. P. 56(c). An issue of fact is “genuine” only if there is sufficient
evidence for a reasonable fact finder to find for the non-moving party. *See Anderson v. Liberty*
Lobby, Inc., 477 U.S. 242, 248-49 (1986). A fact is “material” if it may affect the outcome of
the case. *See id.* at 248. The party moving for summary judgment bears the initial burden of

1 identifying those portions of the pleadings, discovery, and affidavits that demonstrate the
 2 absence of a genuine issue of material fact. *See Celotex Corp. v. Cattrett*, 477 U.S. 317, 323
 3 (1986). Once the moving party meets its initial burden, the non-moving party must go beyond
 4 the pleadings and, by its own evidence, “set out specific facts showing a genuine issue for
 5 trial.” Fed. R. Civ. P. 56(e). In order to make this showing, the non-moving party must
 6 “identify with reasonable particularity the evidence that precludes summary judgment.”
 7 *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). “In considering a motion for summary
 8 judgment, the court may not weigh the evidence or make credibility determinations, and is
 9 required to draw all inferences in a light most favorable to the non-moving party.” *Freeman*
 10 *v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997).

11 **B. Title VII Discrimination Claims**

12 Under Title VII, an employer may not “discriminate against an individual with respect
 13 to his ... terms, conditions, or privileges of employment” because of his race. 42 U.S.C. §
 14 2000e-2(a). “This provision makes ‘disparate treatment’ based on race a violation of federal
 15 law.” *Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654, 658 (9th Cir. 2002). “In
 16 responding to a summary judgment motion in a Title VII disparate treatment case, a plaintiff
 17 may produce direct or circumstantial evidence demonstrating that a discriminatory reason more
 18 likely than not motivated the defendant’s decision, or alternatively may establish a prima facie
 19 case under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411
 20 U.S. 792 (1973).” *Dominguez-Curry v. Nev. Transp. Dep’t*, 424 F.3d 1027, 1037 (9th Cir.
 21 2005) (citation omitted).

22 **1. McDonnell Douglas⁵**

23 “Under *McDonnell Douglas*, a plaintiff alleging disparate treatment under Title VII
 24 must first establish a prima facie case of discrimination. Specifically, the plaintiff must show
 25 that (1) he belongs to a protected class; (2) he was qualified for the position; (3) he was subject
 26

27 ⁵ Plaintiff relies upon caselaw applying the *McDonnell Douglas* framework and
 28 caselaw applying a “mixed motive” framework. *See* Doc. # 17 at 7-8 (citing *Dominguez-Curry*
 (*McDonnell Douglas* framework) and *Desert Palace v. Costa*, 539 U.S. 90 (2003) (“mixed
 motive” framework)). The Court applies the *McDonnell Douglas* framework.

1 to an adverse employment action; and (4) similarly situated individuals outside his protected
 2 class were treated more favorably.” *Nicholson v. Hyannis Air Serv., Inc.*, 580 F.3d 1116, 1123
 3 (9th Cir. 2009) (quotation omitted). “At summary judgment, the degree of proof necessary to
 4 establish a prima facie case is minimal and does not even need to rise to the level of a
 5 preponderance of the evidence.” *Dominguez-Curry*, 424 F.3d at 1037 (quotation omitted). “If
 6 the plaintiff establishes a prima facie case, the burden of production shifts to the employer to
 7 articulate a legitimate, nondiscriminatory reason for the employment decision. ... If the
 8 employer offers a nondiscriminatory reason, the burden returns to the plaintiff to show that the
 9 articulated reason is a pretext for discrimination.” *Leong v. Potter*, 347 F.3d 1117, 1124 (9th
 10 Cir. 2003) (citing *McDonnell Douglas*, 411 U.S. at 804).

11 **a. Prima Facie Case**

12 It is undisputed that the first two elements of the prima facie case are satisfied: Plaintiff
 13 belongs to a protected class, and he was qualified for the position of Meat Manager. It is also
 14 undisputed that Plaintiff’s demotion constitutes an adverse employment action.⁶ The parties
 15 dispute whether Plaintiff has produced evidence that similarly situated individuals outside
 16 Plaintiff’s protected class were treated more favorably.

17 Plaintiff has produced evidence that Reyes, the San Diego Commissary Produce
 18 Manager, was out of tolerance repeatedly. For the twelve months between February 2007 and
 19 January 2008, the Produce Department was out of cumulative and monthly tolerance every
 20 month, losing money each month. (Pl. Ex. 58 at 346, Doc. # 22-2; Pl. Ex. 59 at 354, Doc. #
 21 22-2). During five of these months, the Produce Department’s losses exceeded the losses of
 22 the Meat Department. (Pl. Ex. 58 at 346, Doc. # 22-2; Pl. Ex. 59 at 354, Doc. # 22-2).
 23 Plaintiff was placed on a Performance Improvement Plan on December 20, 2007, two months

24
 25 ⁶ Defendant contends that the December 2007 Performance Improvement Plan, the
 26 January 2008 Letter of Concern and the March 2008 Proposed Demotion Letter are not
 27 sufficiently adverse to support a Title VII claim. With respect to the Performance
 28 Improvement Plan and the Letter of Concern, Plaintiff has failed to exhaust his administrative
 remedies, and therefore summary judgment is granted as to those actions, as discussed *infra*.
 With respect to the Proposed Demotion Letter, Plaintiff does not contend that it is
 independently actionable, only that it “formed the necessary ‘paper trail’ created by Defendant
 to establish a pretextual justification for the clearly actionable employment decisions that
 followed.” (Doc. # 17 at 10).

1 before Reyes was placed on a Performance Improvement Plan. (Pacoma Decl. ¶¶ 10-11, Doc.
2 # 15-2).

3 “Individuals are similarly situated when they have similar jobs and display similar
4 conduct. The employees need not be identical; they must simply be similar in all material
5 respects.” *Nicholson*, 580 F.3d at 1125 (quotations omitted). Defendant contends that Reyes’
6 tolerance problems were not as severe or chronic as Plaintiff’s problems. However, viewing
7 all inferences in the light most favorable to Plaintiff, a reasonable jury could conclude that
8 Plaintiff and Reyes exhibited *similar* tolerance problems. A reasonable jury could conclude
9 that Reyes was treated more favorably than Plaintiff because he was given two months longer
10 than Plaintiff to resolve his tolerance problems before being placed on a Performance
11 Improvement Plan.

12 Plaintiff has submitted evidence of the accountability reports for all commissaries in
13 Zone 16. These reports show that numerous meat and produce departments in Zone 16 have
14 had problems staying in tolerance. The 29 Palms Produce Department was out of cumulative
15 and monthly tolerance for 24 months during the 35 months between July 2007 and May 2010,
16 including losses of over \$38,000 a month for each of the last three months. (Pl. Ex. 59 at 355,
17 Doc. # 22-2; Pl. Ex. 60 at 363, Doc. # 22-2; Pl. Ex. 61 at 371, Doc. # 22-2). The Yuma Marine
18 Corps Air Station Produce Department was out of cumulative and monthly tolerance for 16
19 consecutive months from March 2008 to June 2009, losing money each month. (Pl. Ex. 60 at
20 363, Doc. # 22-2). Woody, who is in charge of Zone 16, testified that “a lot of stores have
21 inventory variations,” but to his knowledge, the only person who has been “disciplined ... for
22 inventory variation” is Plaintiff. (Woody Dep. at 165-66, Pl. Ex. 22, Doc. # 17-3).

23 As Defendant correctly notes, Plaintiff has failed to submit evidence of potentially
24 relevant variables in the Zone 16 accountability reports, such as the races of the department
25 managers, the races of their managers, and whether the same department manager held that
26 position during the entire time the department was out of tolerance. This failure lessens the
27 weight of the evidence, but it does not render it inadmissible to show the final element of a
28 prima facie case. *See Mangold v. Cal. Pub. Utils. Comm’n*, 67 F.3d 1470, 1476 (9th Cir. 1995)

1 (upholding the relevance and admissibility of statistical evidence that did not isolate all
2 potentially relevant variables—including the ages of the employees—in support of the fourth
3 element of the prima facie case of a disparate treatment age discrimination claim).

4 Viewing the evidence in the light most favorable to Plaintiff, the Court finds that the
5 Zone 16 accountability reports, in combination with Plaintiff's evidence related to Reyes'
6 tolerance problems, are sufficient to create a genuine issue of material fact as to whether
7 similarly situated individuals outside Plaintiff's protected class were treated more favorably.
8 *Cf. Dominguez-Curry*, 424 F.3d at 1037 ("At summary judgment, the degree of proof
9 necessary to establish a prima facie case is minimal and does not even need to rise to the level
10 of a preponderance of the evidence.") (quotation omitted).

11 The Court finds that Plaintiff has produced sufficient evidence to establish a prima facie
12 case under *McDonnell Douglas*.

13 **b. Legitimate, Nondiscriminatory Reason**

14 There is no dispute that Defendant has articulated a legitimate, nondiscriminatory
15 reason for demoting Plaintiff: Plaintiff's department was repeatedly out of tolerance.
16 According to the memorandum announcing Plaintiff's proposed demotion, Plaintiff was
17 demoted for being out of monthly tolerance during the periods of July 2007 through September
18 2007 and November 2007 through February 2008, and out of cumulative tolerance during the
19 period of August 2007 through February 2008. (Def. Ex. 46 at NOL_336-337, Doc. # 15-5).
20 The proposed demotion memorandum also cites Plaintiff's failure to properly store and
21 package meat on February 26, 2008 and March 4, 2008. However, Barcelona—who issued the
22 actual demotion decision—testified that "the only reason" he demoted Plaintiff "was that the
23 meat department was not within appropriate inventory tolerance." (Barcelona Dep. at 173, Pl.
24 Ex. 53, Doc. # 17-5). Accordingly, the Court finds that there is an issue of fact as to whether
25 Plaintiff's alleged failure to properly store and package meat was a basis for Plaintiff's
26 demotion. Viewing all inferences in the light most favorable to Plaintiff, the sole basis for the
27 demotion that the Court will consider on summary judgment is Plaintiff's failure to keep his
28 department in tolerance.

1 **c. Pretext**

2 “At the third step of the *McDonnell Douglas* scheme, the plaintiff must show that the
3 articulated reason is pretextual either directly by persuading the court that a discriminatory
4 reason more likely motivated the employer or indirectly by showing that the employer’s
5 proffered explanation is unworthy of credence.” *Nicholson*, 580 F.3d at 1126-27 (quotation
6 omitted). “To avoid summary judgment at this step, however, the plaintiff must only
7 demonstrate that there is a genuine dispute of material fact regarding pretext. The amount of
8 evidence required to do so is minimal.” *Id.* at 1127.

9 Plaintiff contends that pretext is shown by the “memorandum of correction” issued by
10 Vick less than a week after Plaintiff was demoted. (Pl. Ex. 1 at 2, Doc. # 17-3). In that
11 memorandum, Vick stated: “The purpose of this memorandum is to provide corrected
12 information in regards to our accountable inventory conducted on April 30, 2008. ... Transfer
13 sales amount of \$24,591.11 from Grocery Department to Meat Department. ... Pork Mini Ribs
14 have been scanning to Grocery Department....” *Id.*

15 Barcelona—who issued the demotion decision—testified that he was not aware “some of
16 the Meat Department stuff was being credited to another department.” (Barcelona Dep. at 182,
17 Pl. Ex. 42, Doc. # 17-5). Barcelona also testified that if “some of the meat products were being
18 credited to a different department instead of the Meat Department,” that would affect his
19 opinion of whether Plaintiff should have been subjected to discipline. (*Id.* at 73-74). Deaser,
20 the human resources representative, testified that “at no point in time during the disciplinary
21 process [of Plaintiff] did anybody [on] the commissary management team articulate that there
22 was a problem scanning any specific product to the wrong department.” (Deaser Dep. at 146-
23 47, Pl. Ex. 43, Doc. # 17-5). Deaser testified that this information “would be something to
24 consider” as a mitigating factor. (*Id.* at 146). Woody, Vick’s immediate supervisor, testified
25 that he was not informed that (1) \$24,591.11 was credited to the Meat Department shortly after
26 Plaintiff was demoted; (2) the Meat Department was in cumulative tolerance on the day
27 Plaintiff was demoted; and (3) a “loss ... was suffered when [DeCA] moved from the old store
28 to the new store.” (Woody Dep. at 146, Pl. Ex. 44, Doc. # 17-5; *see also id.* at 117-18, 121-23,

1 125). Woody testified that he “would have liked to have seen those documents,” and he
2 “would expect [his] managers to keep [him] in the loop,” but that “in some instances, I don’t
3 believe [Vick] did.” (*Id.* at 146). Woody testified that the \$24,591.11 “memorandum of
4 correction” and the fact that the Meat Department was in cumulative tolerance on the day
5 Plaintiff was demoted “should have been taken into consideration” prior to implementing
6 discipline. (*Id.* at 126).

7 This evidence creates an issue of fact as to whether the decisionmakers were informed
8 of, and/or took into consideration, potentially favorable information to Plaintiff during the
9 decisionmaking process. This constitutes indirect evidence of pretext. *See Lindsey v. SLT Los*
10 *Angeles, LLC*, 447 F.3d 1138, 1152-53 (9th Cir. 2006) (evidence of pretext included the
11 decisionmaker “ignor[ing] documents or parts of documents in the files that favored
12 [plaintiff]”); *cf. Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d
13 1136, 1143 (9th Cir. 2001) (evidence of pretext included the decisionmaker making last-minute
14 changes to the selection criteria which served to disadvantage the plaintiff in a discriminatory
15 denial of promotion case). Similarly, there is an issue of fact as to whether Vick took into
16 account Plaintiff’s written response to the proposed demotion, despite evidence that Plaintiff
17 timely submitted it. (Barcelona Dep. at 243, Def. Ex. 53, Doc. # 15-5 (Barcelona testified that
18 he showed Plaintiff’s written response to Vick, and Vick said “I’m not honoring that
19 statement.”)).

20 Plaintiff’s evidence creates an issue of fact as to whether any of the decisionmakers
21 considered the *Douglas* factors prior to disciplining Plaintiff. (Vick Dep. at 318, Pl. Ex. 25,
22 Doc. # 17-4; Pacoma Dep. at 275, Pl. Ex. 45, Doc. # 17-5; Barcelona Dep. at 251-52, Pl. Ex.
23 46, Doc. # 17-6; Deaser Dep. at 138, Pl. Ex. 47, Doc. # 17-6). Plaintiff also has created an
24 issue of fact as to whether Defendant adhered to DeCA Directive 50-4, which provides a
25 “penalty table” that states that a first offense for “failure to observe written regulations, orders,
26 rules or procedures” should result in a “written reprimand to 1 day suspension.” (Pl. Ex. 20
27 at 93, Doc. # 17-3). Although the “penalty table” is meant as a “guide” which “should not be
28 applied mechanically,” “[w]hen the action taken exceeds the standard table of penalties an

1 explanation for exceeding the table of penalties should be provided in the proposed notice of
 2 disciplinary action.” (*Id.* at 82-83). This evidence supports an inference of pretext. *See Porter*
 3 *v. Cal. Dep’t of Corr.*, 419 F.3d 885, 896 (9th Cir. 2005) (holding that “deviations from
 4 [defendant’s] protocols support an inference of pretext”).

5 Plaintiff has presented evidence that, after Plaintiff was demoted and transferred, the
 6 San Diego Commissary has had no African-American managers. (Pacoma Dep. at 43, Pl. Ex.
 7 56, Doc. # 17-6). This constitutes evidence of pretext, *see Bergene*, 272 F.3d at 1143 (holding
 8 that the absence of “women supervisors at the Coronado Generating Station..., apart from
 9 human resources personnel” constitutes circumstantial evidence of pretext in gender
 10 discrimination case), but because there are only a handful of supervisors at the San Diego
 11 Commissary, the Court does not give this evidence significant weight. *See Aragon*, 292 F.3d
 12 at 663 (“[T]he fact that three of the four casuals singled out for lay off that night were white
 13 could constitute circumstantial evidence of discrimination demonstrating pretext. Yet, because
 14 the sample size is so small, we decline to give it much weight.”).

15 Viewing Plaintiff’s evidence of pretext cumulatively, the Court concludes that Plaintiff
 16 has produced the “minimal” evidence necessary to “demonstrate that there is a genuine dispute
 17 of material fact regarding pretext.” *Nicholson*, 580 F.3d at 1127; *see also Noyes v. Kelly*
 18 *Servs.*, 488 F.3d 1163, 1170 (9th Cir. 2007) (“All of the evidence as to pretext ... is to be
 19 considered cumulatively.”); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1124 (9th Cir. 2004)
 20 (“We have held that very little evidence is necessary to raise a genuine issue of fact regarding
 21 an employer’s motive.... When the evidence ... consists of more than the *McDonnell Douglas*
 22 presumption, a factual question will almost always exist with respect to any claim of a
 23 nondiscriminatory reason.”) (quotation omitted).

24 The Motion for Summary Judgment as to Plaintiff’s Title VII discrimination claim
 25 related to his demotion is denied.

26 **2. Exhaustion**

27 “In order to bring a Title VII claim in district court, a plaintiff must first exhaust her
 28 administrative remedies.” *Sommatino v. U.S.*, 255 F.3d 704, 707-08 (9th Cir. 2001) (citing 42

1 U.S.C. § 2000e-16(c)). “Under the Title VII statutory and regulatory scheme, a federal
 2 employee must notify an EEO counselor of discriminatory conduct within 45 days of the
 3 alleged conduct, and then, if the matter is not resolved, the employee may submit a formal
 4 administrative complaint.” *Id.* at 708 (citing 29 C.F.R. § 1614.105 (pre-complaint processing);
 5 29 C.F.R. § 1614.106 (individual complaints)). This “time limit is treated as a statute of
 6 limitations for filing suit and is subject to waiver, equitable tolling, and estoppel. Failure to
 7 bring a grievance within the [forty-five day] statute can be fatal to a federal employee’s
 8 discrimination claim.” *Johnson v. U.S. Treasury Dep’t.*, 27 F.3d 415, 416 (9th Cir. 1994)
 9 (citation omitted).

10 It is undisputed that Plaintiff first contacted an EEO counselor on May 8, 2008. (Pl. Ex.
 11 27 at 142, Doc. # 17-4). Accordingly, Plaintiff failed to timely exhaust his administrative
 12 remedies as to any discrete act occurring before March 21, 2008, which was forty-five days
 13 earlier. This includes the December 2007 Performance Improvement Plan (which ended in
 14 February 2008) and the January 2008 Letter of Concern. Plaintiff does not contend that the
 15 doctrines of waiver, equitable tolling, and/or estoppel are applicable.⁷ Accordingly, the Motion
 16 for Summary Judgment as to Plaintiff’s Title VII discrimination claims related to the
 17 December 2007 Performance Improvement Plan and the January 2008 Letter of Concern is
 18 granted.

19 **C. Evidentiary Objections**

20 Plaintiff’s objections and/or requests to strike evidentiary materials cited in this Order
 21 are denied. Plaintiff’s objections and/or requests to strike evidentiary materials not cited in this
 22 Order are denied as moot.

23 **D. Title VII Retaliation Claim**

24 Title VII prohibits retaliation against an employee for opposing unlawful
 25 discrimination. *See* 42 U.S.C. § 2000e-3(a). “To establish a prima facie case of retaliation
 26 under Title VII, [the plaintiff] must show (1) that he acted to protect his Title VII rights; (2)

27 ⁷ Plaintiff contends that “evidence of the 12/07 PIP and the 1/08 Letter of Concern is
 28 admissible to demonstrate the wrongful motive of the Defendants.” (Doc. # 17 at 9). Issues
 related to the admissibility of evidence may be raised in a motion in limine prior to trial.

1 that an adverse employment action was thereafter taken against him; and (3) that a causal link
 2 existed between the two events.” *McGinest*, 360 F.3d at 1124 (citation omitted). “If [the
 3 plaintiff] has asserted a prima facie case of retaliation, the burden shifts to [the employer] to
 4 articulate a legitimate, non-discriminatory reason for the adverse employment action. If [the
 5 employer] articulates such a reason, [the plaintiff] bears the ultimate burden of demonstrating
 6 that the reason was merely a pretext for a discriminatory motive.” *Manatt v. Bank of Am.*,
 7 *N.A.*, 339 F.3d 792, 800 (9th Cir. 2003) (quotation omitted).

8 Plaintiff contends:

9 The Plaintiff has proffered substantial evidence to the effect that the draconian
 10 reduction in his pay, effected subsequent to the filing of his EEO complaint, was
 11 wrongful and substantial, and would clearly deter a reasonable person from
 12 filing a charge of discrimination. The Plaintiff has also proffered substantial
 13 evidence to the effect that a wrongful motive was more likely than not a
 14 motivating factor in the action. In this regard, Plaintiff was told, on several
 occasions, by multiple managers that he would have ‘safe pay,’ despite the
 demotion. Those individuals include Jackie Deaser, the Human Resources
 Specialist, Dave Woody, and Kevin Hennely, the DeCA counselor. He did, in
 fact, receive safe pay through August, 2008 when his pay was retroactively cut.
 Additionally, DeCA sought reimbursement.

15 (Doc. # 17 at 14 (citations omitted)).

16 **1. Prima Facie Case**

17 It is undisputed that the first two elements of a prima facie case of retaliation has been
 18 satisfied with respect to Plaintiff’s pay reduction. The parties dispute whether Plaintiff has
 19 established an issue of fact as to whether there is a causal link between Plaintiff’s EEO activity
 20 and his reduction in pay.

21 “[C]ausation can be inferred from timing alone where an adverse employment action
 22 follows on the heels of protected activity.” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054,
 23 1065 (9th Cir. 2002) (citations omitted). “[W]hen adverse employment decisions are taken
 24 within a reasonable period of time after complaints of discrimination have been made,
 25 retaliatory intent may be inferred.” *Passantino v. Johnson & Johnson Consumer Prods., Inc.*,
 26 212 F.3d 493, 507 (9th Cir. 2000) (“Moreover, we have held that evidence based on timing can
 27 be sufficient to let the issue go to the jury, even in the face of alternative reasons proffered by
 28 the defendant.”); *see also Miller v. Fairchild Indus.*, 885 F.2d 498, 505 (9th Cir. 1989) (prima

1 facie case of causation was established when discharges occurred forty-two and fifty-nine days
2 after EEOC hearings); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (sufficient
3 evidence existed where adverse actions occurred less than three months after complaint filed,
4 two weeks after charge first investigated, and less than two months after investigation ended).

5 On April 29, 2008, Plaintiff was demoted, and this decision was reaffirmed on May 2,
6 2008. (Def. Ex. 48 at NOL_340, Doc. # 15-5; Def. Ex. 49 at NOL_342, Doc. # 15-5).
7 Plaintiff has produced evidence that, at the time of his demotion, Barcelona, Woody and
8 Deaser expected Plaintiff's pay to be unaffected by the demotion. (Jeffries Dep. at 327-28, Pl.
9 Ex. 30, Doc. # 17-4; Woody Dep. at 130, Pl. Ex. 51, Doc. # 17-6).

10 Approximately one week after Plaintiff's demotion, on May 8, 2008, Plaintiff initiated
11 a complaint with the DeCA EEO office, alleging racial discrimination. (Pl. Ex. 27 at 142, Doc.
12 # 17-4). On May 9, 2008, Vick received an e-mail from an EEO counselor regarding
13 Plaintiff's charge of discrimination. (Pl. Ex. 17 at 70, Doc. # 17-3). The same day, Vick
14 forwarded the e-mail to Woody and Deaser. *Id.*

15 The "request for personnel action" requesting Plaintiff be "change[d] to a lower [pay]
16 grade" was initiated on May 15, 2008 and completed on June 4, 2008. (Def. Ex. 51 at
17 NOL_352, Doc. # 15-5). The "request for personnel action" has a space for the name of the
18 official requesting the change, but the space was left blank. *Id.* However, Woody testified that
19 Deaser is the human resources "personnel specialist" who was handling Plaintiff's demotion
20 and who "is supposed to know about" whether Plaintiff's pay would be reduced because of the
21 demotion. (Woody Dep. at 132, Pl. Ex. 51, Doc. # 17-6).

22 Plaintiff has produced sufficient evidence for a jury to find that, prior to Plaintiff's EEO
23 activity, Deaser stated that Plaintiff's pay would be unaffected by the demotion, but a week
24 after Deaser learned that Plaintiff initiated his EEO activity, an unnamed personnel official
25 initiated the request for Plaintiff's pay to be reduced. Viewing all inferences in the light most
26 favorable to Plaintiff, this evidence creates an issue of fact as to whether there is a causal link
27 between Plaintiff's EEO activity and his reduction in pay. *See Villiarimo*, 281 F.3d at 1065.

28 2. Legitimate, Nondiscriminatory Reason

Defendant has articulated a legitimate, nondiscriminatory reason for the adverse employment action: Plaintiff's reduction in pay was a nondiscretionary consequence of Plaintiff's demotion. (Doc. # 15-1 at 18). The safe pay provision applicable to Plaintiff provides that, "[f]or internal placement actions which constitute a change to a lower grade ... pay will be set at the step which equals or exceeds the highest previous rate unless ... the action is for performance or disciplinary reasons." (DeCA Directive 50-26, App. G ¶ G-3, Def. Ex. 15 at NOL_214; cf. 5 C.F.R. § 9901.355(b)(4) (safe pay not applicable "when an employee is involuntarily placed in a position in a lower pay band for unacceptable performance and/or conduct"))).

3. Pretext

Plaintiff has produced evidence that, prior to Plaintiff's EEO activity, Deaser told Woody that Plaintiff's pay would not be reduced because of the demotion. (Woody Dep. at 130, Pl. Ex. 51, Doc. # 17-6). Viewing all inferences in the light most favorable to Plaintiff, this statement from Defendant's "personnel specialist," *id.* at 132, is sufficient to create an issue of fact as to whether Defendant had the discretion to leave Plaintiff's pay unaffected by the demotion. This evidence is sufficient to create an issue of fact as to whether Defendant's proffered explanation for the pay reduction—that it was nondiscretionary—"is unworthy of credence," and therefore pretextual. *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1066 (9th Cir. 2003).

Accordingly, the Motion for Summary Judgment as to Plaintiff's Title VII retaliation claim is denied.

E. CSRA Claim

Defendant contends that "this Court lacks jurisdiction over Plaintiff's CSRA claim" because "Plaintiff has waived his CSRA claim by bypassing the [Merit Systems Protection Board] in favor of the district court." (Doc. # 15-1 at 19, 25).

A "mixed case" complaint "is a complaint of employment discrimination filed with a federal agency based on race ... related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB)." 29 C.F.R. § 1614.302(a)(1). A "mixed case"

1 complaint may be filed with the employer-agency's EEO process (pursuant to 29 C.F.R. §
 2 1614.302) or with the MSPB (pursuant to 5 C.F.R. § 1201.151), but not with both. *See* 29
 3 C.F.R. § 1614.302(b). If the "mixed case" complaint is filed with the federal agency's EEO
 4 process and a final agency decision is not issued within 120 days of the date of filing, "the
 5 complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 C.F.R.
 6 1201.154(b)(2) or may file a civil action as specified at § 1614.310(g), but not both." 29
 7 C.F.R. § 1614.302(d)(1)(i); *see also* 29 C.F.R. § 1614.310(g) ("An individual who has a
 8 complaint processed pursuant to ... this subpart is authorized by 5 U.S.C. 7702 to file a civil
 9 action in an appropriate United States District Court: ... (g) After 120 days from the date of
 10 filing a formal complaint if there is no final action or appeal to the MSPB...."). Section 7702
 11 of Title 5 of the United States Code provides:

12 [I]f at any time after ... the 120th day following the filing of any matter ... with
 13 an agency, there is no judicially reviewable action ... an employee shall be
 14 entitled to file a civil action *to the same extent and in the same manner as*
 provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C.
 2000e-16(c))

15 5 U.S.C. § 7702(e)(1)(A) (emphasis added).

16 Plaintiff filed an EEO complaint with Defendant on June 1, 2008. (Def. Ex. 50 at
 17 NOL_344, Doc. # 15-5). After waiting over 120 days, and before Defendant issued a decision
 18 on the EEO complaint, Plaintiff filed the Complaint in this Court on March 20, 2009. (Compl.
 19 ¶¶ 6-7, Doc. # 1). The parties agree that this situation is governed by 5 U.S.C. §
 20 7702(e)(1)(A), but the parties dispute whether this Court has jurisdiction over Plaintiff's Title
 21 VII claims alone, or whether this Court also has jurisdiction over Plaintiff's CSRA claim.

22 The majority of courts to have addressed this issue have held that the language of 5
 23 U.S.C. § 7702(e)(1)(A) stating "to the same extent and in the same manner as provided in
 24 [Title VII]," does not limit the district court's jurisdiction to only those claims arising under
 25 Title VII. *See Ikossi v. Dep't of the Navy*, 516 F.3d 1037, 1041 (D.C. Cir. 2008) ("The plain
 26 text of the concluding clause of section 7702(e)(1)–'to the same extent and in the same manner
 27 as provided in section 717(c) of the Civil Rights Act of 1964...'–demonstrates that it is not a
 28 limitation on the type of claims that may be pursued.... The ... referenced statutory provision[]

1 [is] procedural in nature.... Thus, the concluding clause of section 7702(e)(1) merely specifies
2 the procedure that governs mixed cases....”) (holding that the district court had jurisdiction
3 over the CSRA claims in addition to the discrimination claims when the agency failed to issue
4 a decision within 120 days); *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 472 (6th Cir. 2003)
5 (“[A] plaintiff may properly bring a mixed case complaint through an employer-agency’s EEO
6 process, and then, if the agency takes no action within 120 days, bring the mixed case
7 complaint to the district court.”); *Doyal v. Marsh*, 777 F.2d 1526, 1536 (11th Cir. 1985)
8 (“Congress, through this section [i.e., § 7702], has explicitly given the employee certain rights
9 and options, one of which is to file a civil action based on his mixed case complaint before
10 resorting to the MSPB.”); *but see Bonds v. Leavitt*, 647 F. Supp. 2d 541, 580 (D. Md. 2009)
11 (“It is undisputed that cases arising only under the CSRA proceed to the MSPB and a record
12 is created to permit further review in either the Federal Circuit or a federal district court. Yet,
13 under the reasoning of *Ikossi*, *Seay*, and *Doyal*, a different procedure would apply to cases
14 initiated at the agency through the EEO process that had not been decided in 120 days; those
15 cases suggest that nondiscrimination claims (e.g. ... CSRA) should be permitted to proceed to
16 a federal district court absent the MSPB record. However, this approach undermines the
17 efficacy and desirability of record review of CSRA decisions, and it appears inconsistent to
18 permit some claims to come to the court based upon a review of the record while others would
19 receive de novo review.”). The majority “holding ... reflects the legislative history, which
20 states that ‘questions of the employee’s inefficiency or misconduct, and discrimination by the
21 employer, are two sides of the same question and must be considered together.’” *Ikossi*, 516
22 F.3d at 1037 (quoting, inter alia, *Doyal*, 777 F.2d at 1537). In a different context, the Ninth
23 Circuit has relied upon this principle: “Every circuit considering the issue of proper treatment
24 of CSRA cases alleging a colorable racial discrimination claim has refused to approve
25 bifurcation [of discrimination claims and CSRA claims]. ... [T]he legislative history of the
26 CSRA, considerations of judicial economy, and the interests of the litigant all weigh against
27 bifurcation.” *Tolliver v. Deniro*, 790 F.2d 1394, 1396 (9th Cir. 1986) (citing, inter alia, *Doyal*,
28 777 F.2d at 1536-37).


1 The Court finds the reasoning of the majority position to be most consistent with the
2 language of 5 U.S.C. § 7702(e)(1) and the intent of Congress. The Court concludes that it has
3 jurisdiction over Plaintiff's CSRA claim. The Motion for Summary Judgment as to Plaintiff's
4 CSRA claim is denied.

5 **V. Conclusion**

6 IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is granted
7 in part and denied in part. (Doc. # 15). The Motion for Summary Judgment is granted as to
8 Plaintiff's Title VII discrimination claims related to the December 2007 Performance
9 Improvement Plan and the January 2008 Letter of Concern. The Motion for Summary
10 Judgment is denied in all other respects. Plaintiff's request to strike evidentiary materials
11 submitted by Defendant is denied. (Doc. # 17-2, 18).

12 No later than fourteen (14) days from the date this Order is filed, the parties shall
13 contact the chambers of the Magistrate Judge to schedule a case management conference
14 regarding the status of discovery and to schedule a new final pretrial conference date.

15 DATED: August 31, 2010

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17 **WILLIAM Q. HAYES**
18 United States District Judge
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